Petition

81-577

No.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

CITIZENS COMMITTEE TO SAVE HISTORIC RHODES TAVERN,

Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT AND OLIVER T. CARR, JR., AND GEORGE H. BEUCHERT, JR., TRUSTEES

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

WILLIAM A. DOBROVIR
(Counsel of Record)
DOBROVIR, OAKES & GEBHARDT
Suite 1105
1025 Vermont Ave., N.W.
Washington, D.C. 20005
(202) 347-8118

Attorney for Petitioner

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

QUESTION PRESENTED FOR REVIEW

Did the Council of the District of Columbia, in exercising legislative power delegated to it by Congress, unconstitutionally re-delegate that power when it authorized the Mayor of the District or his designee, without any standards or guidelines, to decide what is "exemplary architecture", and to permit real estate developers to destroy a federally registered historic landmark based on a determination that a new office building, to be put in place of the historic landmark, was of "exemplary architecture"?

LIST OF PARTIES

The names of all parties are contained in the Caption.

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SUPREME COURT OF THE UNITED STATES
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CITIZENS COMMITTEE TO SAVE HISTORIC RHODES TAVERN,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Citizens Committee to Save Historic Rhodes Tavern petitions for a writ of certiorari to review the Judgment of the District of Columbia Court of Appeals in this case.

OPINIONS AND ORDERS BELOW

The opinion of the District of Columbia Court of Appeals rendered May 29, 1981, is reproduced as Appendix A. The order of the District of Columbia Court of Appeals on petition for rehearing en banc, rendered June 25, 1981, is reproduced as Appendix B. The Order, Findings of Fact and Conclusions of law

of the Mayor's Agent for D.C. Law 2-144, the administrative decision appealed from, is reproduced as Appendix C.

JURISDICTION

The decision of the District of Columbia Court of Appeals denying petitioner's petition for rehearing en banc and letting stand its decision of May 29, 1981, was rendered on June 25, 1981. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution, Article I, section 1:

> All legislative powers herein granted shall be vested in a Congress of the United States....

Constitution, Article I, section 8, clause 17:

> The Congress shall have Power... to exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may by Cession of particular States, and the Acceptance by Congress, become the Seat of the Government of the United States....

District of Columbia Code

District of Columbia Self Government and Reorganization Act

D.C. Code § 1-121:

(a) Subject to the retention by Congress of the ultimate legislative authority over the Nation's Capital granted by article I, section 8, of the Constitution, the intent of Congress is to delegate certain legislative powers to the government of the District of Columbia; authorize the election of certain local officials by the registered qualified electors in the District of Columbia; grant to the inhabitants of the District of Columbia powers of local self-government; to modernize, reorganize, and otherwise improve the governmental structure of the District of Columbia; and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters.

D.C. Code § 1-122:

(2) The term "Council" means the Council of the District of Columbia provided for by subchapter III of this chapter.

D.C. Code § 1-124:

> Except as provided in sections 1-126, 1-147, and 47-228, the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States....

D.C. Code § 1-126:

> Notwithstanding any other provision of this Act, the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject....

D.C. Code § 1-144:

> (a) Subject to the limitations specified in sections 1-126, 1-127, 1-147, and 47-228, the legislative power granted to the District by this Act is vested in and shall be exercised by the Council in accordance with this Act.

Historic Landmark and Historic District Protection

D.C. Code § 5-822:

> (h) "Mayor" means the Mayor of the District of Columbia, or his designated agent.
>
> * * * *
>
> (j) "necessary in the public interest" means consistent with the purposes of this chapter as

set forth in section 5-821(b) or necessary to allow the construction of a project of special merit.

* * * *

(k) "special merit" means a plan or building having significant benefits to the District of Columbia or to the community by virtue of exemplary architecture, specific features of land planning, or social or other benefits having a high priority for community services.

* * * *

(n) "unreasonable economic hardship: means that failure to issue a permit would amount to a taking of the owner's property without just compensation or, in the case of a low-income owner(s) as determined by the Mayor, failure to issue a permit would place an onerous and excessive financial burden upon such owner(s).

D.C. Code § 5-824:

(a) Before the Mayor may issue a permit to demolish an historic landmark or a building or structure in an historic district, the Mayor shall review the permit application in accordance with this section and place notice of the application in the District of Columbia Register.
(b) Prior to making the finding required by subsection (e) of this section, the Mayor may refer the application to the Historic Preservation Review Board for a recommendation, but shall so refer all applications that are not subject to review by the Commission of Fine Arts under the

Old Georgetown Act (D.C. Code, sec. 5-801 et seq.). The Mayor shall consider any recommendation by the Review Board or by the Commission of Fine Arts pursuant to such referral.

(c) Within one hundred and twenty (120) days after the Review Board receives the referral, the Mayor shall, after a public hearing, make the finding required by subsection (e) of this section: Provided, that the Mayor may make such finding without a public hearing in the case of a building or structure in an historic district or on the site of an historic landmark if the Review Board has advised in its recommendation that the building or structure does not contribute to the historic district or the historic landmark.

(d) If the Review Board recommends against granting the permit, it shall promptly notify the applicant in writing of its recommendation and the reasons therefor.

(e) No permit shall be issued unless the Mayor finds that issuance of the permit is necessary in the public interest, or that failure to issue a permit will result in unreasonable economic hardship to the owner.

STATEMENT OF THE CASE

The Rhodes Tavern has sat since 1799 at the corner of 15th Street and F Street, opposite the U.S. Treasury. It has viewed every Presidential inaugural procession since Thomas Jefferson's in 1805. It has been designated by the Joint Committee on Landmarks of the National Capital as a Category II Historic Landmark on the National Register of Historic Places maintained by the Department of Interior. D.C. Code § 5-822(f), 5-824; National Historic Preservation Act of 1966, 16 U.S.C. §§ 470 *et. seq.*[1] In the Joint Committee's words, the Rhodes Tavern is

> the oldest extant commercial structure in Washington's Downtown Area, served as a polling place in the first municipal election of 1802, as one of the first banks in the District, and was the

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[1] A category II landmark is defined by the Joint Committee on Landmarks as one of importance which contributes significantly to the cultural heritage or visual beauty and interest of the District of Columbia and its environs and which should be preserved or restored, if possible.

> tavern from which the British command directed the burning of the White House and Treasury in 1814. It was also the first home of the banking institution which is now Riggs National Bank. The building has been in continuous commercial use since it was built and its site has been historically important as a hub of commerce and finance since the foundation of the city.

App. A, 11a n.12. In disrepair today, its essential structure remains intact and nonprofit groups have offered to restore it for use again as a restaurant in the heart of the nation's capital.[2] This case involves an application by developers to demolish the Rhodes Tavern in order to construct a large office and retail store building.

In 1978 the Council of the District of Columbia belatedly joined the rest of the United States in enacting legislation to preserve the tangible historic heritage of our nation's capital, fast disappear-

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[2] R. [the record in the court below] 1113-16, 439.

ing under the developer's sledge hammer.[3] App. A 3a; *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 107-08 (1978). The legislation, the Historic Landmark and Historic District Protection Act of 1978, D.C. Code § 5-821 *et. seq.* (Supp. VII 1980) (the Act), was enacted pursuant to Congress' express delegation to the Council of its legislative authority over the District of Columbia and became law upon the failure of Congress to exercise its reserved power to disapprove Council legislation. Supp. VII, *supra* at 302; *see* D.C. Code §§ 1-121(a), 1-126, 1-144(e), 1-147(c) (Supp. V 1978).

The Act's protections are triggered by a developer's application to demolish a building designated as a historic landmark. The application to demolish the historic landmark Rhodes Tavern therefore was set down for hearing under the Act, to determine whether the developers' office and retail project was a "project

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[3] See, e.g., J. Goode, Capital Losses, a Cultural History of Washington's Destroyed Buildings (1979).

of special merit" -- defined in pertinent part as having "exemplary architecture," and whether demolition of the historic landmark was necessary to construct the developers' project. App. A, 8a-9a. The Act provides for such hearings to be held before the Mayor of the District of Columbia or his "designated agent." Pursuant to designation and subdesignation the required hearing was held before a civil servant employed in the District's Department of Housing and Community Development, Ms. Carol Thompson, Special Assistant to the Director of the Department. App. A, 8a, 19a.

Petitioner was a party to the proceeding before the Mayor's Agent, presented numerous witnesses, introduced documentary evidence, cross-examined and argued. Subsequent to the hearing the Mayor's Agent ruled that the Rhodes Tavern could be demolished, holding that the developers' office and commercial building was "of special merit by virtue of exemplary architecture." App. A, 8a-9a; App. C, 43a.

Petitioner sought review of the Mayor's

Agent's decision by the District of Columbia Court of Appeals. Petitioner argued *inter alia* that the statutory criterion of "exemplary architecture," nowhere further defined in the Act and to be applied not by knowledgeable architects but by a lay hearing officer, was so vague that it was an unconstitutional delegation of legislative power to the Mayor. App. A, 18a-19a. The lower court rejected the argument, holding that the hearing procedures, which provided for submission of architectural drawings "sufficient... to indicate the exterior design", *i.e.* the "height, appearance, texture, color and nature of materials" of the developers' project, provided "objective factors" that supplied the lack of any standards in the Act for determining what architecture was "exemplary". *Id.* Petitioner petitioned for rehearing of this determination *inter alia*; the petition for rehearing was denied without opinion.

REASONS FOR GRANTING THE WRIT

In the District of Columbia home rule legislation of 1973 the Congress, "subject to retention of the ultimate legis-

lative authority" over the District, "delegate[d] certain legislative powers" to the Council of the District. D.C. Code §§ 1-121(a), 1-122(2), 1-144(a). The grant is of "legislative power... consistent with the Constitution of the United States," D.C. Code § 1-124. All legislation enacted by the Council is subject to the approval of the Congress. *Id.* § 1-147(c).

Thus the Council in enacting the Historic Landmark Protection Act was exercising legislative power granted to Congress by Article I of the Constitution, and in exercising that power the Council was limited, as the Congress is, by the constitutional doctrine of separation of powers.

The Council unconstitutionally delegated its legislative power to the Mayor's designee when it gave him the power to determine whether architecture is "exemplary" and order the destruction of an irreplaceable historic building based on such a determination; but without providing legislatively prescribed standards to guide the official in determining whether architecture is "exemplary".

1.

The limits on the power of the Congress to delegate legislative authority are narrow. It is axiomatic in a complex society that the legislative branch must delegate the greater part of the detailed application of the laws to administrators. But limits there are, nonetheless; and this is one of the rare cases where even those narrow limits were exceeded.

The test, framed by this Court in *Yakus v. United States*, 321 U.S. 414, 425 (1944), is whether the legislative description of the task assigned "sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will." *See United States v. Robel*, 389 U.S. 258, 272-73 (1967) (Brennan, J., concurring). The separation of powers doctrine "establishes a principle of accountability under which compatibility with the legislative design may be ascertained not only by the Congress, but by the courts and the public." *Amalgamated Meat Cutters & Butcher Workers v. Connally*, 337 F.Supp.

737, 746 (D.D.C. 1971) (three judge court). That principle of accountability is breached when "there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus v. United States*, 321 U.S. at 426.

The short statement of this test, and hence the minimal hallmark of a constitutional delegation of power to implement legislative policy, is the presence of an "intelligible principle" to guide the executive in its exercise of the power. *Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928) *quoted in Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring); *see Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935); *see also Bowles v. Willingham*, 321 U.S. 503, 514 (1944). No intelligible principle can be discerned in the naked phrase "exemplary architecture." It is far

vaguer than, say, "good architecture" -- which itself would be too broad a standard to pass constitutional muster.

"Exemplary" means no more than "pertaining to an example" or "serving for an illustration". 3 Oxford English Dictionary 398 (1933). It refers to something "liable to be turned into a precedent," that would "attract notice, remarkable, extraordinary". At its most precise, "exemplary" means "serving as a model or pattern," having the "quality of being worthy of imitation". *Id.* 397, 398. In a time and place where buildings may be designed in any style from imitation Greek revival to imitation Victorian to imitation Federal to Bauhaus modern, and when controversy over whether a style or particular building is good, bad or indifferent rages,[4] there is patently no "intelligible principle" in a standard that instructs the agency to decide whether an architectural design is "worthy of imitation."

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[4] See, e.g., T. Wolfe, From Bauhaus to Our House (1981), excerpted in Harper's Magazine (June and July 1981) and in The Washington Post Magazine (August 2, 1981).

2.

The presence of an "intelligible principle" of legislative policy articulated in statutory standards is indispensable if the courts are to have any meaningful ability to review the agency's implementation of the legislature's will. As Justice Harlan observed, the separation of powers doctrine "prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged." *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part); cited in *Industrial Union Department v. American Petroleum Institute*, 448 U.S. at 685-86 (Rehnquist, J., concurring).

Judicial review of an administrator's finding that an architect's concept is "exemplary" or worthy of imitation would be a rudderless voyage. The language of the Act sets both court and agency adrift without a compass in a vast sea empty of aids to navigation. Indeed, the impossibility of court review of a decision under "exemplary architecture" language

is illustrated by the failure of the lower court even to attempt such review.

The lower court repeated, with seeming approval but without evaluation or analysis, the Mayor's Agent's jargon-imbued conclusion that the developer's office building plan had "sensitive incorporation," a "major design impact," "reinforcement to the monumentality and powerful rhythm," "a sense of ceremonial closure," etc., etc., etc. App. A, 9a, 10a; *see* App. C, 39a-41a, 43a-44a. This is not judicial review. It is judicial abdication and it is made necessary by the impossibly vague statute the court was to apply -- because meaningful review of a decision whether a building design was "exemplary architecture" would force the court to substitute its guideless judgment for that of the agency. Neither the judges of the D.C. Court of Appeals nor a D.C. government civil servant may be made the *arbiter elegantiae* of the stones of the nation's capital. If that function is to be exercised at all by the government it is within the exclusive province of the legislative branch.

Were the Council to decree that all new buildings replacing historic landmarks be in, say, the Greek revival style of the Treasury building, or resemble the Jefferson Memorial, that might not be wise architectural policy; but it would be a policy established by the legislative branch of government with the constitutional authority to make such policy. To place that decision in the unfettered hands of an executive branch official may or may not result in better architecture -- but it unconstitutionally gives legislative power to that official, power whose exercise courts are helpless to review.

3.

The Act thus gives the Special Assistant to the Director of the D.C. Department of Housing and Community Development power to range from Vitruvius to Buckminster Fuller, to order the razing of any building, however precious,[5] if he fan-

[5] For example, at the hearing one of the developer's witnesses had no difficulty contemplating the demolition of St. John's Church on Lafayette Square, the "Church of Presidents," if it did not fit in with some adjacent new project. R. 1055-56.

cies its replacement by -- say -- a replica of Horace Walpole's "folly," Strawberry Hill, if that is the style of architecture the official considers "exemplary." It is altogether unlike the historic preservation acts in force in many localities, which avoid the fatal defects of vagueness and standardless delegation by reference to the style of architecture in existing historic districts or to preservation of existing architectural monuments. *See, e.g.*, in the nation's capital The Old Georgetown Act, D.C. Code § 5-801, *et. seq.* (1973); in New Orleans' French Quarter the "Vieux Carre Ordinance", *Maher v. City of New Orleans*, 516 F.2d 1051, 1062 (5th Cir. 1975), *City of New Orleans v. Levy*, 64 So.2d 798 (La. 1953); *South of Second Assoc. v. Georgetown*, 196 Colo. 89, 580 P.2d 807 (1978); *A-S-P Assoc. v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979);[6] *and see Penn Cen-*

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[6] Id. at 453 n.4:

> There are three major divisions to the architectural guidelines and design standards [incorpo-

(Footnote continued on next page.)

tral Transportation Co. v. City of New York, 438 U.S. at 107 & n.1. To empower an agency to preserve what exists or to require new construction to conform to its historic neighbor is a constitutionally valid reference to objective criteria, as those statutes and decisions made plain. To empower a local government employee to choose architectural styles

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[6] (Footnote continued from previous page.)

> rated into the ordinance]... those which apply to existing structures of the Victorian style are further subdivided into nine categories, each of which focuses on a different structural element, e.g. materials, colors, and fenestration patterns. A description of the different victorian styles as they relate to a particular structural element is given. Specific and general prohibitions of designs, materials and styles that are incongruous with the existing elements of particular victorian styles are also set forth. Similar, although less developed, consideration is given to the other architectural styles of historical interest found in the Historic District.

at whim is an unconstitutional loose cannon.

4.

The Act's reference to "exemplary architecture" might conceivably pass constitutional muster if anything in its legislative history, its factual background or its statutory context supplied the missing guidance. *See Industrial Union Department v. American Petroleum Institute*, 448 U.S. at 675-76, 682-83 (Rehnquist, J., concurring), and cases cited, especially *Lichter v. United States*, 334 U.S. 742, 783 (1948), and *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946). Here the only available legislative history, the Council's report,[7] does no more than parrot the statute. Search in the contemporary factual background, search in pre-existing administrative practice and search for guidance elsewhere in the Act are likewise vain. There is simply nothing

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[7] Report of the Committee on Housing and Urban Development on Bill 2-367, "The Historic Landmark and Preservation Act of 1978" at 6, 9 (October 5, 1978).

to help us understand what the Council meant by the phrase "exemplary architecture."

The lower court purported to save the Act as here applied by finding the requisite "objective factors" in the kind of evidence an applicant claiming "exemplary architecture" must submit: "architectural drawings" showing the "height, appearance, texture, color and nature of materials." App. A, 18a. This, the lower court declared, "gives substance" to the phrase "exemplary architecture", making it "sufficiently concrete to withstand a claim of unconstitutional vagueness." App. A, 19a. The lower court entirely misapprehended the constitutional infirmity at issue. It is not lack of evidence on which a determination of architectural merit could be based; it is the lack of legislatively established standards of architectural merit against which to measure the evidence, however complete.

5.

The "exemplary architecture" language in the Act might have been saved by

conferring the responsibility of applying it upon an expert body. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *Schecter Poultry Corp. v. United States*, 295 U.S. at 539. In *Maher v. City of New Orleans*, on which the court below relied, App. A, 18a, not only did the ordinance refer to the objective reality of the existing architecture in the French Quarter, but as the Fifth Circuit pointed out, the composition of the administering commission assured the expert, sensitive and complementary skills of "architects, historians and business persons." 516 F.2d at 1062 & n.64.[8] Here the Council has crowned architectural czar of the nation's capi-

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[8] There is no lack of expert bodies already functioning in our nation's capital in official capacities: the Joint Committee on Landmarks and the National Commission on Fine Arts which reviews new construction under the old Georgetown Act, D.C. Code § 5-802, to name two. The Act itself establishes a Historic Preservation Review Board whose membership is to meet the requirements of the Department of Interior under the National Historic Preservation Act, 16 U.S.C. § 470 et. seq. The Mayor has not yet appointed the Board.

tal any individual whom the Mayor may choose to appoint as his agent; in this case, a second level bureaucrat of the city's housing agency.

6.

Despite the apparently clear language of the Act of Congress that gave legislative power to the D.C. Council, *see* Page 1 *supra*, there has never been a clear acceptance of the rule against delegation of legislative power within the District government. Reluctance to embrace the constitutional requirement runs through the court below, which is the District's court of last resort, as well as the federal courts sitting in the District.

This Court, in approving Congress' first District of Columbia home rule legislation, "conclude[d] that the Congress had the authority under... the Constitution to delegate *its* lawmaking authority" to the 1871 predecessor of the Council, and held that Congress' delegation is "subject of course to constitutional limitations to which all law-making is subservient" thus implying at least that the

limiting separation of powers doctrine follows Congress' delegation. *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 109-10 (1953) (emphasis added); *Fireman's Insurance Co. v. Washington*, 483 F.2d 1323, 1327 (D.C. Cir. 1973). Nevertheless in *Halleck v. Berliner*, 427 F.Supp. 1225, 1233 (D.D.C. 1977), the U.S. District Court for the District of Columbia could say "[i]t is doubtful whether the doctrine of separation of powers applies with the same force to the governmental structure of the District of Columbia as it does to the federal government." *See also Hobson v. Hansen*, 265 F.Supp. 902, 915 (D.D.C. 1967); *but cf. LaForest v. Board of Commissioners*, 92 F.2d 547, 550 (D.C. Cir. 1937), *cert. denied* 302 U.S. 760 (1937), *and see Palmore v. United States*, 411 U.S. 389, 397 (1973) (Congress may legislate for the District of Columbia on any subject).

More recently the Chief Judge of the District of Columbia Court of Appeals, concurring in *D.T. Corp. v. Alcoholic Beverage Control Board*, 407 A.2d 707 (D.C. App. 1979), has chided himself and

his brethren for having largely "failed to address ourselves to the crucial predicate questions: (1) whether the criteria prescribed by the regulatory statute... are sufficiently specific to pass constitutional muster when confronted with a challenge asserting a delegation of unbridled administrative discretion. ..." *Id.* at 710; *see also id.* at 710-12.

No decision of the lower court or of this Court has expressly addressed the question whether the separation of powers doctrine applies to the District of Columbia government -- specifically to Council legislation enacted pursuant to Congress' delegation in the 1973 Home Rule legislation. The question thus has been lurking for eight years. This Court should settle it now.

CONCLUSION

With one exception, the District of Columbia's Historic Preservation law carefully and specifically serves the values this Court recognized in *Penn Central*, the public's interest in preserving the tangible record of history embodied in our historic building heri-

tage and the competing rights of land owners. To strike the absurdly vague provision respecting "exemplary architecture" will leave in place the well-defined exemptions for unreasonable economic hardship to the owner and social and other benefits having high priority for community services.[9] It will reaffirm the application of the doctrine of separation of powers to the government of the District, while ensuring that the architectural whimsy of an untutored

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[9] See, e.g., App. A 13a n.13; D.C. Code § 5-822(k), (r); Report of the Committee on Housing and Urban Development, n.7 supra at 21, defining "economic hardship" by reference to decisions of this Court.

bureaucrat does not replace the decision of the elected representatives of the people.

Respectfully submitted,

WILLIAM A. DOBROVIR
Dobrovir, Oakes & Gebhardt
Suite 1105
1025 Vermont Ave., N.W.
Washington, D.C. 20005
(202) 347-8118

Attorney for Petitioner

APPENDICES

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 80-179

CITIZENS COMMITTEE TO SAVE HISTORIC RHODES TAVERN, PETITIONER,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, RESPONDENT.

OLIVER T. CARR, JR., and GEORGE H. BEUCHERT, JR., TRUSTEES, INTERVENORS.

Petition for Review of an Order of the District of Columbia Department of Housing and Community Development

Judgment entered this date

(Argued October 29, 1980 Decided May 29, 1981)

William A. Dobrovir, with whom *S. Richard Rio, Jr.*, was on the briefs, for petitioner.

Richard B. Nettler, Assistant Corporation Counsel, argued for respondent. *Richard W. Barton*, then-Deputy Corporation Counsel, also entered an appearance for respondent. (Respondent adopted the briefs of intervenors.)

Norman M. Glasgow, with whom *Norman M. Glasgow, Jr.*, and *Carolyn J. Hamm* were on the briefs, for intervenors.

Before HARRIS, MACK, and FERREN, *Associate Judges*.

HARRIS, *Associate Judge*: Petitioner seeks review of an order of the Mayor's Agent issued under the District of Columbia Historic Landmark and Historic District Protection Act of 1978, D.C. Code 1980 Supp., §§ 5-821 *et seq.* (the Act), authorizing a demolition permit to allow the razing or relocation of a building located at the corner of 15th and F Streets, N.W., known as Rhodes Tavern.[1] In its challenge to the order, petitioner contends that: (1) the Mayor's Agent failed to apply the appropriate statutory standard for concluding that the permit should be issued; (2) there was insufficient evidence in the record to support the finding of the Mayor's Agent that demolition is necessary to allow the construction of a project of special merit; (3) the Act is impermissibly vague; and (4) the Mayor's Agent erred in denying petitioner's motion for her disqualification. Finding no error, we affirm.

I

The chronology of events in this case is somewhat complex and the issues are pervaded by a degree of emotionalism.[2] On one side is petitioner, a group of citizens

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[1] The structure has been utilized for a variety of commercial uses since serving as a tavern and meetingplace in the early 1800's.

[2] In testimony before the Mayor's Agent on the application, Rhodes Tavern was referred to as everything from a "sorry remnant[]" to "a jewel." While one observer expressed the view that keeping Rhodes Tavern in the midst of the proposed new construction would create "a tooth gap in the smile of 15th Street," another suggested that its destruction "would tear a gaping hole in the rich tapestry of the city's history." One witness called Rhodes Tavern "a rather mundane, ordinary, not terribly historically important building," while another pointed out that "the most extraordinary events can begin in small places, like stables for instance." In a written submission to the Mayor's Agent, that writer also

motivated by a desire to preserve historical values in the District of Columbia, which unquestionably is one of the nation's historically most significant cities. On the other side are the intervenors, motivated by their not altogether selfless desire to stimulate economic growth in a city in need of it. In between was the Mayor's Agent who, in effect, is directed by statute to resolve the conflict between preservation and development objectives. Our review of her decision is limited.

In enacting our historical preservation statute, the District of Columbia joined the 50 states and over 500 municipalities which have passed similar statutes "to encourage or require the preservation of buildings and areas with historic or aesthetic importance." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 107 (1978) (footnote omitted). As the Supreme Court noted, these legislative efforts have been prompted by two concerns:

> The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today. [*Id.*, at 108 (footnotes omitted).]

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suggested that relocating Rhodes Tavern would be like "preserv[ing] Plymouth Rock . . . by moving it inland."

See also Maher v. City of New Orleans, 516 F.2d 1051, 1060 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976). Likewise, our statute declares "as a matter of public policy that the protection, enhancement and perpetuation of properties of historical, cultural and aesthetic merit are in the interests of the health, prosperity and welfare of the people of the District of Columbia." D.C. Code 1980 Supp., § 5-821(a). *See Don't Tear It Down, Inc. v. Department of Housing and Community Development*, D.C. App., —— A.2d —— (No. 80-883, Mar. 6, 1981, slip op. at 7). To implement this policy, the Act provides a statutory scheme whereby, once a building has been designated a historic landmark, proceedings looking to demolish or alter it in any way must be conducted by the Mayor or his designated agent[3] with the advice of the Historic Preservation Review Board.[4]

Against this backdrop, intervenors propose to construct an office and retail stores complex subsuming the downtown block bounded by 14th, 15th, F, and G Streets, N.W., excluding the area occupied by Garfinckel's department store. In designing their proposal, intervenors were faced at the outset with a substantial obstacle, namely, the presence on the site of three Category II landmark structures: the Keith's Theater and Albee Building (Keith-

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[3] *See* D.C. Code 1980 Supp., § 5-822(h).

[4] Permit applications affecting landmarks in the Old Georgetown district are subject to review by the Commission of Fine Arts, *see* D.C. Code 1973, § 5-802, and may be referred to the Historic Preservation Review Board for a recommendation. All other applications, as in this case, must be referred to the Review Board before being acted upon by the Mayor's Agent. D.C. Code 1980 Supp., § 5-824. Until such time as the Mayor establishes a local Review Board, the Board's functions under the Act are being performed by the Joint Committee on Landmarks. *See id.*, § 5-823(a).

Albee), the National Metropolitan Bank building (the Bank), and the remains of Rhodes Tavern, a portion of which had been destroyed in 1957.[5] The structures face, directly across 15th Street, the United States Treasury Building, which is a Category I landmark.

By the fall of 1977, the Carr Company was investigating development alternatives for the site. In January 1978, intervenor Carr contracted with the architectural firm of Skidmore, Owings & Merrill to prepare a comprehensive study of the site's design potential with particular attention to determining the feasibility of preserving all three landmarks on the block. The architect assigned to the project prepared nine alternative proposals, ranging from total preservation of all three landmarks to their total demolition. In assessing the various options, the architect's main objective was to design a project combining the revitalization of a portion of downtown

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[5] Under procedures established by the Joint Committee on Landmarks for the designation of historic landmarks and districts, categories are defined as follows:

> "Category I" means *Historic Landmarks* and *Historic Districts* of great importance which contribute significantly to the national cultural heritage or that of the District of Columbia and its environs and which must be preserved.
>
> "Category II" means *Historic Landmarks* and *Historic Districts* of importance which contribute significantly to the cultural heritage or visual beauty and interest of the District of Columbia and its environs and which should be preserved or restored.
>
> "Category III" means *Historic Landmarks* and *Historic Districts* of value which contribute to the cultural heritage and visual beauty and interest of the District of Columbia and its environs and which should be preserved or restored.

23 D.C. Reg. 1402, 1403 (1976).

Washington with the preservation of those historic structures which, by virtue of their scale and design, would contribute to that revitalization. In line with this objective and in light of preliminary cost analyses, the Carr Company gave further consideration to four of the nine alternatives:

(1) Retain Rhodes Tavern and the facades of the Keith-Albee and Bank buildings;

(2) Retain the facades of the Keith-Albee and Bank buildings, without Rhodes Tavern;

(3) Retain only Rhodes Tavern; and

(4) Demolish all three structures to allow all new construction.

In the meantime, after applying for demolition permits for the three structures, intervenor Carr began negotiating with the city for assistance in obtaining grants to fund preservation of the landmarks.[8] Carr also negotiated with local preservation groups, including the Joint Committee on Landmarks and Don't Tear It Down, Inc., in an effort to gain their support. When it became clear that funding sufficient to retain all three structures would not be forthcoming, demolition of the rear portion of the Keith-Albee building began (pursuant, of course, to

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[8] At a formal negotiating session on May 17, 1978, Carr estimated the cost of preserving all three structures to be a little more than $5.9 million, of which the Carr Company was willing to assume $2 million if the other parties would work to secure the remainder. At a later session, the Carr Company revised its earlier estimate upward to $7.2 million based on increases in labor costs, interest rates, and other expenses attributable to delay.

a permit). On April 25, 1979, Don't Tear It Down filed suit in the Superior Court in an effort to stop the demolition. *Don't Tear It Down, Inc. v. Oliver T. Carr Co.*, Civil Action No. 5046-'79. Shortly thereafter, the trial court ruled that demolition could proceed since the city had failed in its efforts to secure adequate public funding to retain all three structures. Negotiations among Carr, the city, and Don't Tear It Down continued. From those, the current proposal emerged. Since the District government—with the concurrence of Don't Tear It Down—placed a higher priority on retention of the facades of the Keith-Albee and Bank buildings (because of their scale and design in relation to the Treasury building) over retention of the substantially smaller Rhodes Tavern, an agreement was reached whereby Carr could construct a complex that would: (1) retain the 15th Street facade and at least four bays of the G Street facade of the Keith-Albee building; (2) retain the 15th Street facade of the Bank building; (3) either donate Rhodes Tavern to a nonprofit organization for relocation, or demolish it; and (4) relocate the interior of the Old Ebbitt Grill within the new commercial structure.

Intervenors applied for the permits needed to proceed with the project, including a permit for the demolition of Rhodes Tavern.[7] Pursuant to our historical preservation statute, the applications were referred to the Joint Committee on Landmarks for review. On October 18, 1979, the Joint Committee recommended that the Mayor's Agent hold a public hearing

> to determine if any of the three demolitions requested should be permitted and whether the alteration requested is a project of special merit.

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[7] A demolition permit must be obtained to allow either the relocation or razing of Rhodes Tavern.

> The Committee believes that the Rhodes Tavern, a Category II Landmark, which by definition should be preserved, if possible, should not be demolished or moved unless the Mayor's Agent determines that the proposed alteration is a project of special merit.

The Mayor's Agent conducted a public hearing on the applications on December 10, 11, and 13, 1979. On February 11, 1980, finding the requested permits to be necessary to allow the construction of a project of special merit, the Mayor's Agent ordered the issuance of the permits. This petition for review followed.

II

In order to authorize issuance of a demolition permit to raze a historic landmark, the Mayor's Agent must find "that issuance of the permit is necessary in the public interest." D.C. Code 1980 Supp., § 5-824(e).[8] Under the Act, the phrase "necessary in the public interest" means "consistent with the purposes of this chapter as set forth in section 5-821(b) or necessary to allow the construction of a project of special merit." *Id.*, § 5-822(j).[9]

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[8] Alternatively, a permit may issue upon a finding that failure to issue one "will result in unreasonable economic hardship to the owner." *Id.* Intervenors have not made such a claim in this case.

[9] Section 5-821(b) provides in pertinent part:

> (b) It is further declared that the purposes of this chapter are:
>
> * * *
>
> (2) with respect to historic landmarks:
>
> (A) to retain and enhance historic landmarks in the District of Columbia and to encourage their adaptation for current use; and
>
> (B) to encourage the restoration of historic landmarks.

A project of "special merit" is one "having significant benefits to the District of Columbia or to the community by virtue of exemplary architecture, specific features of land planning, or social or other benefits having a high priority for community services." *Id.*, § 5-822(k).

In her order of February 11, 1980, the Mayor's Agent found the proposed project to be "one of special merit by virtue of exemplary architecture . . . because of the sensitive incorporation of the facades of the Keith-Albee Building along with that of the adjacent National Metropolitan Bank Building into the total project." [10] Additionally, she found that issuance of the permits was "necessary to allow the construction of a project of special merit." [11]

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[10] More particularly, she concluded that:

> The facades of these two structures create a major design impact at one of the most strategic locations along the ceremonial route between the Capitol and the White House. Visually and architecturally integral parts of the 15th Street financial district, these facades offer particular reinforcement to the monumentality and powerful rhythm of the colonnaded east side of the U.S. Treasury Building. They create a sense of ceremonial closure before the climactic turn of the route onto Pennsylvania Avenue toward the White House. The scale, massing, fenestration, and other details of the facades of the Keith-Albee and National Metropolitan Bank Buildings are continued into the new construction at the southwest corner of the block so that the sense of monumentality and rhythm is achieved along the entire 15th Street frontage.

[11] Specifically, with respect to Rhodes Tavern, she found that:

> [Issuance of the] permits requested for demolition or relocation of the structure known as Rhodes Tavern to allow the construction of a contemporary structure complementing the scale, massing and monumentality and continuing the cornice lines of the Keith-Albee and Na-

Petitioner contends that the Mayor's Agent failed to apply the proper statutory standard which, in its view, compels a balancing of the historical values to be lost by demolition against the special merit of the proposed project. Intervenors contend, on the other hand, that the statute specifically requires a finding that a project is one of special merit—with the concomitant finding of necessity to issue a demolition permit in order to allow the project to go forward—and no more. We agree with petitioner that a balancing of historical and development values is required under the Act, but we conclude that the appropriate balance was struck in this case.

Determinations under a locality's historic preservation statute "should not be made in a vacuum. The architectural and historical characteristics of a building must be weighed against its societal functions and the significance of its preservation in human terms." *Young v. Mellon*, 93 Cal.App.3d 1001, ——, 156 Cal.Rptr. 165, 169 (1979). While our statute focuses on a finding of "special merit" as the critical factor in permitting demolition of a historic landmark to allow for new construction, by its very nature it also requires more. With its emphasis on "safeguard[ing] the city's historic, aesthetic and cultural heritage, as embodied and reflected in [its] landmarks and districts," D.C. Code 1980 Supp., § 5-821 (a) (2), the Act implicitly requires that, in the case of demolition, the Mayor's Agent balance the historical value of the particular landmark against the special merit of the proposed project.

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tional Metropolitan Bank Buildings, Category II Landmarks and sympathetically relating to the scale and design of the U.S. Treasury, a Category I Landmark . . . is necessary to allow the construction of a project of special merit.

While the decision of the Mayor's Agent in this case might appear to turn almost exclusively on her finding that the proposed project is one of special merit, implicitly she undertook a proper value-balancing analysis in order to reach that ultimate conclusion. In Finding No. 2 of the findings of fact and conclusions of law which accompanied her Order, the Mayor's Agent noted that Rhodes Tavern "is a Category II Landmark on the District of Columbia's Inventory of Historic Sites and has been listed in the National Register of Historic Places since March 24, 1969." In Finding No. 11, she elaborated, observing that "Rhodes Tavern, constructed between 1799 and 1801, is the oldest extant commercial structure in downtown Washington and is an example of vernacular Federal architecture." She incorporated by reference the more detailed descriptions of Rhodes Tavern contained in the October 18, 1979, report to her of the Joint Committee on Landmarks and in the document supporting nomination of Rhodes Tavern to the National Register. A review of those descriptions is revealing. The documents do laud the historical significance of Rhodes Tavern.[12] However, they also admit candidly that the architectural integrity of the structure has been seriously impaired. Noting that "[t]he building has been much altered in its

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[12] The Joint Committee's Report stated in part:

> The Rhodes' Tavern, the oldest extant commercial structure in Washington's Downtown Area, served as a polling place in the first municipal election of 1802, as one of the first banks in the District, and was the tavern from which the British command directed the burning of the White House and Treasury in 1814. It was also the first home of the banking institution which is now Riggs National Bank. The building has been in continuous commercial use since it was built and its site has been historically important as a hub of commerce and finance since the foundation of the city.

168[now 180]-year history," the National Register nomination stated:

> Although the first floor was changed many times to accommodate different commercial establishments, the building remained largely intact until around 1957 when the five northern bays of the 15th Street wing were razed, leaving only three bays (approximately 30') of the original 76,' and making the building rectangular rather than L-shaped. The building fabric is now in poor condition. The stucco which was applied to the brick sometime after 1903 and which also covers the adjoining building at 1429 F Street is badly cracked and needs paint.
>
> The interiors of the three stores which now occupy the ground floor [as of March 24, 1969] show no trace of original architectural detail. The original chimneys, as shown in the 1817 sketch [by the Baroness de Neuville, wife of the French minister] and a 1903 photograph, no longer exist. The store fronts, and windows and original ground floor entrances no longer exist or have been so changed as to be unrecognizable.

Additionally, during the three-day public hearing, the Mayor's Agent took extensive testimony with respect to the historical nature of Rhodes Tavern, including some which cast doubt on whether certain events purported to have taken place there actually did. The Mayor's Agent also received a substantial number of written comments, many of which focused on Rhodes Tavern's historical significance. The Mayor's Agent's findings of fact and conclusions of law are based entirely on the record. Her detailed findings of fact reflect a consideration of both

the historical value of Rhodes Tavern and the structure's relationship—or lack thereof—to its neighboring landmarks. The record fully supports our conclusion that historical considerations were properly balanced against the special merit of the proposed project.[13]

In the future, we expect the Mayor's Agent in any proceeding under the Act to state with a higher degree of precision which historical values associated with a particular landmark or historic district were considered with respect to a permit application and whether these historical considerations outweigh, or are outweighed by, the merits of that application.[14] This requirement will

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[13] Although the Mayor's Agent premised her finding of special merit in this case on "exemplary architecture," we note that the record also contains evidence with respect to the projected economic benefit to the city of the proposed development. Intervenor Carr testified, for example, that the District government stands to gain in excess of $2 million in tax revenues from development of the property site and that the project will create more than 2,000 permanent jobs, of which 50 percent will be in low or moderate income categories. This is another factor militating in favor of a finding of special merit, D.C. Code 1980 Supp., § 5-822(k), and is a proper consideration in reviewing the grant of a demolition permit to raze a historical landmark. *See Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco*, 106 Cal.App.3d 893, 901, 165 Cal.Rptr. 401, 405 (1980).

[14] *Compare Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco*, *supra* note 13, 106 Cal.App.3d at 917, 165 Cal.Rptr. at 413 (balancing requirement in state's historical preservation statute does not insure that decision made with environmental and historical consequences in mind will always be those which favor the environmental and historical considerations), *with Mayor and Aldermen of City of Annapolis v. Anne Arundel County*, 271 Md. 265, ——, 316 A.2d 807, 823 (1974) (denial of demolition

not apply to administrative decisions rendered prior to the guidance we provide in this opinion as long as we are able to conclude, as we do here, that the Mayor's Agent substantially complied with the requirements of the Act. *See Wheeler v. Board of Zoning Adjustment*, D.C.App., 395 A.2d 85, 90 (1978). All that the Act expressly requires is a finding that issuance of a permit is necessary in the public interest which, in turn, is defined as necessary to allow the construction of a project of special merit. The recommendation of the Joint Committee to the Mayor's Agent was to deny the application for the demolition permit for Rhodes Tavern unless she found the proposed project to be one of special merit. The Mayor's Agent complied with those directives. We are satisfied that, in the course of doing so, she weighed the historical considerations underlying those directives against the special merit of the project, a balancing process which we now declare that the Act implicitly requires.

III

According to petitioner, the conclusion of the Mayor's Agent that issuance of a demolition permit for Rhodes Tavern is necessary to construct a project of special merit is not supported by substantial evidence in the record.[15] Specifically, petitioner argues that, in order to find demolition necessary, the Mayor's Agent must conclude

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application despite clear and uncontradicted testimony as to merit of proposed public improvement on site of historic landmark could be denial of due process).

[15] Under § 5-832(b) of the Act, demolition proceedings are to be conducted in accordance with the applicable provisions of the District of Columbia Administrative Procedure Act. D.C. Code 1973, §§ 1-1501 *et seq.* Accordingly, the findings of fact and conclusions of law in this case must be supported by substantial evidence. *Id.*, § 1-1509(e).

that there is no feasible (in its view) alternative way to complete the project. We rejected that argument in *Don't Tear It Down, Inc. v. Department of Housing and Community Development, supra.*

As noted earlier, intervenors considered a number of alternative design proposals for this project. Intervenor Carr directed his architect to determine the feasibility of preserving all three landmarks on the block; a proposal which would have accomplished this objective was included among nine alternatives prepared for consideration. The alternative which provided for the retention of all three structures was given further study, having been included when the nine alternatives were cut to four. That alternative was rejected only after protracted negotiations between the developers and various public and private community groups which resulted in: (1) a recognition of the inability to obtain sufficient public funding to preserve all three landmarks, and (2) the determination by the city—which Don't Tear It Down endorsed—that higher priority should be given to the retention of the Keith-Albee and Bank building facades than to the preservation of Rhodes Tavern. Consideration of the various alternatives, and the persistent efforts to secure funding to preserve all three structures, were noted in Findings 12 through 21 which accompanied the Order of the Mayor's Agent (and were supported by substantial evidence). These findings, taken as a whole, lead rationally to the conclusion of the Mayor's Agent that issuance of a demolition permit for Rhodes Tavern is necessary in order to construct a project of special merit.

Petitioner makes much of intervenor Carr's testimony before the Mayor's Agent to the effect that the developers intended to go forward with the project even if the demo-

lition permits were not granted. We are not persuaded that this statement (which Carr was pressed to make on cross-examination) means that demolition of Rhodes Tavern must not be necessary after all. In *Don't Tear It Down, Inc. v. Department of Housing and Community Development, supra*, we imposed a reasonableness limitation on the consideration of alternatives to demolition.

> Reasonableness must be imputed into the "necessary" standard, and at the hearing on each "special merit" permit, factors including but not limited to cost, delay, and technical feasibility become proper considerations for determining "necessary." * * * Each of these factors has bearing on whether there are viable alternatives to demolition available, and the answer to this question determines necessity. [*Id.*, slip op. at 24.]

Consequently, it was entirely proper for the Mayor's Agent to consider evidence offered by intervenors showing that preservation of all three structures would cost upward of $7.2 million. Absent public funding, it is apparent that petitioner expects intervenors to bear this cost alone and that, if they do, demolition of Rhodes Tavern will not be necessary. However, as one court has stated: "It is laudable to attempt to preserve a landmark; however, it becomes unconscionable when an unwilling private party is required to bear the expense." *Galich v. Catholic Bishop of Chicago*, 75 Ill.App.3d 538, ——, 394 N.E.2d 572, 577 (1979), *cert. denied*, 445 U.S. 916 (1980), quoting *People ex rel. Marbro Corp. v. Ramsey*, 28 Ill.App.2d 252, 256, 171 N.E.2d 246, 247 (1960). Requiring private parties to spend substantial sums of money to preserve landmark structures—with little or no

public assistance—could rise to the level of an unconstitutional taking. *See Maher v. City of New Orleans, supra*, 516 F.2d at 1066-67. Moreover, development—so vital to a city's growth—could be stymied irreparably. "By placing the costs of architectural preservation squarely on the landmark owner, design and demolition controls may actually discourage private citizens from purchasing and maintaining landmark property. Failure to offset the economic burdens of landmark designation will 'create a class of buildings which will be shunned like lepers.'" Comment, *Allocating the Cost of Historic Preservation: Compensation for the Isolated Landmark Owner*, 74 NW. L. REV. 646, 649 (1979) (footnote omitted).

Under the Act, therefore, demolition is necessary in order to construct a project of special merit whenever retention of the landmark on its original site becomes economically oppressive. *See generally Lafayette Park Baptist Church v. Board of Adjustment of St. Louis*, 599 S.W.2d 61, 66 (Mo. App. 1980). A developer should be required to show that all reasonable alternatives were considered. As we recently stated, that does not mean that a developer may select the least expensive alternative and summarily reject those which are more costly. *Don't Tear It Down, Inc. v. Department of Housing and Community Development, supra*, slip op. at 23-24. However, that is not what occurred in this case. In light of the Mayor's Agent's findings that the intervenors considered alternatives to preserve Rhodes Tavern and that they voluntarily delayed demolition proceedings until efforts to secure public funding were exhausted, we conclude that the evidence in the record was sufficient to support her conclusion that the issuance of a demolition permit is necessary to construct a project of special merit.

IV

Petitioner's final challenge to the Act (or to its interpretation by the Mayor's Agent) is its contention that the statute is impermissibly vague. More particularly, petitioner calls into question the validity of the statutory phrase "exemplary architecture" as a basis for a finding of special merit, D.C. Code 1980 Supp., § 5-822(k), arguing that the phrase requires an aesthetic judgment and is thus a delegation of authority to the Mayor's Agent without standards. We disagree.

"[C]oncerns of aesthetic or historical preservation do not admit to precise quantification." *Maher v. City of New Orleans, supra*, 516 F.2d at 1062 (historical preservation statute does not delegate unfettered authority to decisionmaking body). Those courts which have considered similar provisions have found "historical and/or architectural" language sufficiently definite to pass constitutional muster, *South of Second Associates v. Georgetown*, 196 Colo. 89, ——, 580 P.2d 807, 810 (1978) (en banc) (and cases cited therein), especially in light of other objective factors which the decisionmaker in a particular case is required to consider. *Id.*, at ——, 580 P.2d at 811. In that regard, the rules of procedure adopted as final rules on July 12, 1979, to supplement the Act are instructive. *See* 26 D.C. REG. 263-89 (1979). Rule 3.3(b)(2) provides that where an applicant seeks a demolition permit on the ground of special merit and the claim of special merit is based on "exemplary architecture," the applicant must file with the Mayor (or his Agent) "architectural drawings of sufficient completeness to indicate the exterior design of the building or structure." *Id.*, at 283. The term "design" encompasses "exterior architectural features including height, appearance, texture, color and nature of materials." Rule 1.1(g), *id.*, at

264. These objective factors which must be considered by the Mayor's Agent in weighing a claim of special merit based on "exemplary architecture" give substance to that challenged phrase and render it sufficiently concrete to withstand a claim of unconstitutional vagueness.

In this case, detailed architectural drawings and descriptions fully comporting with the definitions set forth above were submitted. Consideration of the architectural nature of the project in objectively quantifiable terms is reflected in Finding No. 21 of the findings of fact. Hence, there is no merit to the claim that the Mayor's Agent, in finding special merit based on exemplary architecture, acted without standards or that the phrase "exemplary architecture" is impermissibly vague.

V

Finally, petitioner contends that the Mayor's Agent erred in denying its prehearing motion that she disqualify herself in favor of appointing an independent retired judge or a professional arbitrator to decide this case. Petitioner's claim is that it was denied due process by the appearance of unfairness arising from the status of the Mayor's Agent as an employee of the District of Columbia,[16] combined with the public support for the project which had been expressed by the Mayor and other city officials.[17] We find no merit in this claim.

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[16] Pursuant to § 5-822(h) of the Act, the Mayor delegated his responsibilities under the Act to the Director of the Department of Housing and Community Development, *see* 25 D.C. REG. 9564 (1979), who in turn designated one of his special assistants as the Mayor's Agent for purposes of the Act.

[17] For example, on June 13, 1979, the District government issued a news release in which it outlined cooperative efforts between the city and the Carr Company aimed at securing

This is not a case in which the decisionmaker has been the recipient of ex parte communications from an advocate for one side of the issue, *see Quick v. Department of Motor Vehicles*, D.C.App., 331 A.2d 319 (1975), nor is it an instance of personal interest or bias on the part of the decisionmaker. *See Cinderella Career and Finishing Schools, Inc. v. F.T.C.*, 138 U.S.App.D.C. 152, 425 F.2d 583 (1970). In the absence of either of these circumstances, we cannot conclude that petitioner was denied due process.

Nor was there an appearance of unfairness. That the Mayor had issued public statements supporting the project in no way reflects prejudgment on the part of the Mayor's Agent. Rather, we are convinced that this case was decided properly on the basis of an extensive and complete record. As the Mayor's Agent pointed out in denying the motion for disqualification: "A final decision must be based on the evidence of record of the public hearing and accompanied by findings of fact and conclusions of law; and . . . the Mayor's Agent is required to follow the ethical rules of the D.C. Administrative Procedure Act and Rules of Procedure pursuant to [the Act]." She went on to state that she had not received, and would not receive, any direction from the Mayor or from the Director of her Department as to what decision she ultimately would reach. Moreover, intervenors never

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public funds for the retention of the landmarks. A letter of August 6, 1979, from the Mayor to intervenor Carr in which the Mayor expressed his personal commitment "to working with you to complete your exciting project in this key location in the heart of our City," received press attention. Further, the Assistant City Administrator for Planning and Development testified before the Mayor's Agent in favor of the project, specifically recommending it on behalf of the city as a project of special merit.

were led to believe otherwise. In response to a request from intervenor Carr for official assistance in winning approval of the project from the Historic Preservation Review Board, the Assistant City Administrator for Planning and Development correctly noted that any demolition permits needed to go forward with the project were subject to the discretion of the Mayor's Agent and that "[a]ny final decision must be made on the record presented." We have no reason to suspect that the decision was made in a manner other than one conforming fully with the requirements of law. Under these circumstances, absent a showing of any interest in the outcome of the case, and with no actual bias even having been alleged, *see Morrison v. Board of Zoning Adjustment*, D.C.App., 422 A.2d 347, 351 (1980), we are unable to conclude that, by the Mayor's Agent's conducting of these proceedings, "the image of the administrative process [was] transformed from a Rubens to a Modigliani." *Cinderella Career and Finishing Schools, Inc. v. F.T.C.*, *supra*, 138 U.S.App.D.C. at 159, 425 F.2d at 590.

For all of the foregoing reasons, the Order of the Mayor's Agent is

Affirmed.

APPENDIX B

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 80-179

CITIZENS COMMITTEE TO SAVE HISTORIC RHODES TAVERN,

Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT,

Respondent.

OLIVER T. CARR, JR., ET AL.,

Intervenors.

BEFORE: Newman, Chief Judge; *Kelly, Kern, Nebeker, Harris, Mack, Ferren, and Pryor, Associate Judges.

O R D E R

On consideration of petitioner's petition for rehearing en banc, and it appearing that no judge of this Court has called for a vote thereon, it is

ORDERED that petitioner's petition be denied.

PER CURIAM

*Associate Judge Kelly did not participate in this matter.

Copies to:

William A. Dobrovir, Esquire
1025 Vermont Avenue, NW, #1105, 20005

Charles L. Reischel, Esquire
Deputy Corporation Counsel

Norman M. Glasgow, Esquire
1666 K Street, NW, #600, 20006

APPENDIX C

ORDER

Before the Mayor's Agent for D.C. Law 2-144, the Historic Landmark and Historic District Protection Act of 1978.

HPA No. 80-41, Application to raze (demolish) 1429 F Street, N.W. (Rhodes Tavern), Square 224, Lot 809.

HPA No. 80-43, Application to raze (relocate) 1429 F Street, N.W. (Rhodes Tavern), Square 224, Lot 809.

HPA No. 80-46, Application to raze 613 15th Street, N.W. (National Metropolitan Bank Building), Square 224, Lot 811.

HPA No. 80-42, Application for preliminary review, alteration of 610 15th Street, N.W. (National Metropolitan Bank and Keith's Theater-Albee Building), Square 224, Lots 18, 812, 814, 819, 808, 810, 811, 821, 21.

HEARING DATES: December 10, 1979, December 11, 1979, and December 13, 1979.

FINDINGS OF FACT:

1. Applicants, Oliver T. Carr and George Beuchert, have applied for two permits under Section 5 of the Historic Landmark and Historic District Protection Act of 1978 (hereinafter "the Act"), D.C. Law 2-144, to allow relocation or demolition of a structure owned by them in the District of Columbia on Lot 809

in Square 224 known as "Rhodes Tavern" at premises of 1429 F Street, N.W. They have also applied for an application to raze portions of 613 15th Street, N.W., the National Metropolitan Bank Building, located on lot 811 in Square 224 in the District of Columbia. The fourth permit application they have applied for to be considered at the hearing is one for preliminary review of an alteration of 610 15th Street, N.W., the Keith's Theater-Albee Building (Keith-Albee) and the National Metropolitan Bank Building covering lots 18, 812, 814, 819, 808, 809, 810, 811, 821, and 21 in Square 224 in the District of Columbia.

2. 1429 F Street, N.W., "Rhodes Tavern" is a Category II Landmark on the District of Columbia's Inventory of Historic Sites and has been listed in the National Register of Historic Places since March 24, 1969. 1426 G Street, the Keith-Albee, and 613 15th Street, the National Metropolitan Bank Building are also Category II Landmarks individually listed in the National Register of Historic Places.

3. On October 12, 1979, in accord with Sections 5(a) and 6(a) of D.C. Law 2-144, the permit applications were referred to the Mayor's Agent for D.C. Law 2-144.

4. In accord with Sections 5(b) and 6(b) of D.C. Law 2-144, the applications were referred to the Joint Committee on Landmarks of the National Capital, which serves as the Historic Preservation Review Board. The Joint Committee on Landmarks recommended that a hearing be held on the subject applications to determine if any of the three demolitions and the alteration requested should be permitted to construct a project of special merit. The recommendation continued that the Rhodes Tavern, a Category II Landmark, which by definition should be preserved, if possible, should not be demolished or relocated unless the project is determined to be one of special merit. A copy of the Joint Committee's recommendation can be found in Exhibit No. 7.

5. Pursuant to Section 2.5(b)(7) of the Rules of Procedures (Rules) pursuant to the Act, notices of Intent to Schedule a public hearing to consider HPA Nos.

80-41, 80-43, and 80-46 dated October 26, 1979 were issued; a similar Notice of Intent dated November 8, 1979 for consideration of HPA No. 80-42 (Exhibit No. 8) was issued.

6. The applicants filed claim forms for D.C. Law 2-144 for HPA Nos. 80-41, 80-43, and 80-46 on October 29, 1979. On November 20, 1979 a claim form for HPA No. 80-42 was filed. On all of these forms, the applicants claimed that the permit requests were necessary to construct a project of special merit.

7. Materials required by Section 3.3 of the Rules were filed by the Applicants on November 20, 1979, stating their intention to proceed on the basis that the demolitions and alteration are necessary to construct a project of special merit (Exhibit No. 11). The Citizens Committee to Save Historic Rhodes Tavern filed on November 30,1979 as a party in opposition in this case. On December 7, 1979 the Committee to Preserve the Rhodes Tavern and the National Processional Route filed as a party in opposition, was accepted as a party by the hearing agent, and subse-

quently withdrew on December 20, 1979.

8. On Monday, December 10, Tuesday, December 11, and Thursday, December 13, 1979, the Mayor's Agent conducted a public hearing on these applications. During the course of the hearing 28 witnesses were heard and 84 exhibits admitted into evidence. The record was left open until January 3, 1980 to allow entry of statements of non-parties in favor or in opposition to the applications, and 18 such statements were entered into the record on or before January 3, 1980. In addition five items of evidence were entered into the record, after the hearing.

9. Designed by the prominent local architect J.H. de Sibour, the Keith-Albee was erected in 1911-12 in the Beaux Arts style. It remains an excellent example of commercial design, relating positively to nearby individually designated landmarks and to other buildings in the 15th Street financial district. A more detailed description of this was furnished in the Joint Committee's report accompanying the Committee recommendations of

October 18, 1979 (Exhibit No. 7), and in the National Register nomination (Exhibit No. 76).

10. The National Metropolitan Bank Building, erected in 1905-1907, retains a distinctive Beaux Arts style edifice. It was a major work of Washington architect, B. Stanley Simmons, done in collaboration with Gordon, Tracy and Swartwout of New York. A more detailed description is stated in the Joint Committee's report of October 18, 1979 (Exhibit No. 7) and in the National Register nomination (Exhibit No. 77).

11. The Rhodes Tavern,constructed between 1799 and 1801, is the oldest extant commerical structure in downtown Washington and is an example of vernacular Federal architecture. (A more detailed description is stated in the Joint Committee's report of October 18, 1979 (Exhibit No. 7) and in the National Register nomination (Exhibit No. 71).

12. In the spring of 1979 the Cafritz Company made known that the Keith-Albee on lot 18, was available for purchase. The Cafritz Company had done a number of

studies on the potential renovation of the Keith-Albee as well as the site's potential for new construction along the 15th Street frontage. In June 1977 the Keith-Albee was the subject of an agreement of sale between the Carr Company and the Cafritz Company. In the f[illegible] of 1977 the Carr Company contracted with Vlastimil Koubeck to study the development potential of the site. The preliminary studies indicated the necessity for some type of subsidy if all or a part of the Keith-Albee were to be retained. In January 1978, Carr contracted with Skidmore, Owings, and Merrill (SOM) to prepare a comprehensive study of the development potentials of the site from a fresh perspective and with particular attention to studying the feasability of preserving the three landmarks on the site. After much study SOM eventually selected nine alternatives of which four were selected for more detailed study. It was determined by the Carr Company that some subsidy would be necessary if the three landmarks were retained.

13. Upon completion of the preservation-development feasibility studies in February 1978, Mr. Carr applied for demolition permits for the three landmark structures under the previous District of Columbia Historic Preservation Law, D.C. Regulation 73-25. He negotiated with various preservation groups and the Municipal Planning Office, Office of Planning and Development (OPD) during the 180-day delay in demolition invoked on April 7, 1978, by the State Historic Preservation Officer, Mr. Lorenzo Jacobs, under the provisions of the earlier act. Negotiation sessions were held on May 3, May 17, September 5, 18, and 27, 1978. Don't Tear It Down, Inc. (DTID) and the Citizen's Committee to Save Historic Rhodes Tavern were part of these negotiations (Exhibit No. 15). At the May 17, 1978 negotiating session the Carr Company offered estimates that the cost of the retention of all three landmarks would be $5.9 million of which the Carr Company could assume $2 million if the other parties would provide the remainder. However at the September 5, 1978 session

the Carr Company presented revised figures that showed that because of increases in labor, interest rates and other factors caused by the delays, the retention of the three landmarks would cost $7.2 million. None of the negotiating sessions were successful in revealing adequate sources of funding for the retention of the landmarks.

14. On September 27, 1978, at the fifth negotiating session Mr. Carr agreed to allow an additional six months delay after the expiration of the 180 day period on October 4, 1978 until April 20, 1979, to continue to seek funding to preserve all three landmark structures (Exhibit Nos. 15, 36) and to allow for the processing of the application for a $7.2 million Urban Development Action Grant (UDAG). The agreement was stated in a letter of October 17, 1978 from Mr. Carr to Mr. Lorenzo Jacobs, the District's State Historic Preservation Officer. However on March 30, 1979 the D.C. government withdrew the UDAG application from the Department of Housing and Urban Development (HUD)

(Exhibit No. 40). Also on that date the Historic Preservation Officer conditionally awarded $125,000 in matching historic preservation grants-in-aid for the three landmarks. On August 3, 1979 the request for the awards was withdrawn (Exhibit Nos. 53, 54).

15. On January 15, 1979, Mr. Carr proceeded to obtain a demolition permit for the Keith-Albee with the understanding that the demolition would not occur until April 20, 1979 in order to receive word from HUD on the UDAG application. On March 2, 1979, one day before the enactment of D.C. Law 2-144, the permit for the Keith-Albee was issued (Exhibit No. 37). In a letter of March 29, 1979 from Mr. Norman Glasgow, attorney for Mr. Carr, to Mr. Louis Robbins, Acting Corporation Counsel, the terms of the agreement regarding the demolition of the Keith-Albee were again restated: the demolition of the Keith-Albee could proceed if there was not any favorable action received on the UDAG application by April 20, 1979 or if prior to that date, the UDAG application was denied

(Exhibit No. 39). As stated previously, it was withdrawn on March 30, 1979 one day after the date of the letter. Therefore, while Mr. Carr could have proceeded with the demolition of the Keith-Albee as of March 30, 1979, he voluntarily withheld from doing so until April 20, 1979.

16. On April 20, 1979 demolition on the Keith-Albee began.

17. On April 25, 1979, DTID filed suit to stop the demolition. However, the Carr Company agreed to a consent order that allowed for the demolition of the rear and interior portions of the theater while retaining the 15th and G Streets facades while the D.C. government and other interested parties continued to search for possible funding sources (Exhibit No. 42). On May 4th and June 25th, 1979 consent orders again were entered into in order to continue the search for funds (Exhibit Nos. 35, 67). In addition to the consent orders an agreement between the city and the applicants was reached on July 5, 1979 extending the terms of the consent orders

until July 15, 1979. In a press statement of April 26, 1979, Carr outlined his terms for an agreement between himself and the city. He proposed to preserve the facade of the Bank, as the centerpiece of a new construction project, relocate the landmark interior of the Old Ebbits Grill into the interior of the new structure, and donate the Rhodes Tavern, along with $100,000 to a nonprofit group for relocation off of the site in exchange for the city's assistance in closing the alley and handling of a request for a 35' setback for the 15th Street height limit (Exhibit No. 43).

18. In a letter of June 28, 1979, the Carr Company estimated that the cost of the retention of the facade of the Keith-Albee amounted to $3.3 million (Exhibit No. 48). On July 25, 1979, Mr. James O. Gibson wrote to Mr. Carr regarding the amount of funds available, Federal and local, for the retention of the facades. The amount available was considerably less than the $3.3 million (Exhibit Nos. 48, 49). However, on that date, July 25, 1979, the D.C. Superior Court ruled

the total demolition of the Keith-Albee could occur since the city had failed in its effort and the extent of funding was not available as was agreed to be furnished under the third consent order instituted in the action of *Don't Tear It Down, Inc. (DTID) v. Oliver T. Carr, et al.*, No. 5046-79 (Exhibit Nos. 45, 47).

19. Mr. Carr continued to negotiate with the D.C. government who also negotiated with DTID. It was the opinion of the District government that all three of the landmark structures fronting on 15th Street could not be saved given the limited public funding available. Therefore, the District government regarded the retention of the Keith-Albee facade to be of a higher priority for preservation along with retention of the facade of the National Metropolitan Bank because of their relation to the White House precinct, and the Treasury Building in particular, rather than the retention of the Rhodes Tavern. This decision was concurred in by DTID. In August 1979, through a series of letters the applicant and the city entered into

an agreement whereby at least four bays of the Keith-Albee facade on G Street and the entire 15th Street facades of the Keith-Albee and National Metropolitan Bank Buildings would be retained to a depth of two bays (Exhibit Nos. 52, 54, 36b-36f, and 17).

20. A fourth consent order was entered into. In it the DTID agreed to dismiss its suit against the Carr Company and not to bring further court action against the applicant in exchange for Mr. Carr's assurance not to demolish the 15th Street facades of the Keith-Albee and National Metropolitan Bank Buildings and four bays of the G Street facade of the Albee Building. The City in return agreed to certain non-monetary assurances, including expedited assistance in the closing of the alley and amendment of the height limit from 95' to 130'. Also as a part of this agreement was the applicant's proposal to remove the Rhodes Tavern from its site by demolition or relocation to another site by a non-profit organization. On December 21, 1979, a letter to this effect was signed by the

Applicant and the Committee to Preserve the Rhodes Tavern and the National Processional Route (Exhibit No. 92).

21. During the hearing the project architect, Mr. David Childs of Skidmore, Owings, and Merrill, discussed the design concept for the project. Retained by Carr in January 1978 Skidmore, Owings, and Merrill was instructed to prepare a comprehensive study of development alternatives for the block from a fresh perspective assessing the relationship of the block to that of surrounding historic properties and the potential for developing a larger area of downtown. Nine alternatives were arrived at of which seven retained some type of preservation in the overall development scheme (Exhibit No. 18) (The other two were entirely new construction after total demolition).

A-1 Fourfold total preservation with the replication of the missing portion of the Rhodes Tavern.

A-2 Retention of the 15th Street facade (first two bays of the Bank), the entire Keith-Albee and no Rhodes Tavern.

A-3 Retention of entire Keith-Albee.

A-4 Retention of two bays of the office portion of Keith-Albee, the first bays of the Bank and the Rhodes Tavern.

A-5 Similar to A-4 but without the Rhodes Tavern on the corner.

A-6 Retention of the Rhodes Tavern and the Bank.

A-7 Retention of only the Rhodes Tavern.

These options were narrowed to A-4, A-5, and A-6. Mr. Childs testified to the importance of scale of the proposed project to that of the Treasury Building and the streetscape of the White House precinct as the reason for the selection of A-5. The design complements the scale, massing, and design of the U.S. Treasury Building, located across 15th Street directly west of the site, and a Category I Landmark, as well as other buildings in this area such as the Riggs Bank. The proposed project incorporates the significant design features of the highly ornamental Beaux-Arts facades of the Keith-Albee and the Bank. The central triple arch motif from the entrance way of the Bank is repeated at other pedestrian en-

trances. Columns in the new construction have been designed as pilasters similar to those of the Keith-Albee. The top cornice of the new construction has been designed as a simplified, implied column capital that is similar to that of the Keith-Albee and Bank. On the second, third, and seventh floors, the new building is incised to break the apparent mass of the new construction. Similar to the design solution achieved by the Keith-Albee and Bank, the recesses of the new construction occur at points that create proportional relationships between the base, midsection and top. Ornamental metal railings on these floors also complement the Beaux Arts detailing similar to that on the Keith-Albee and Bank. The articulation of the windows, walls, spandrels, and columns repeat the rhythm of the voids and solids.

The architectural niche on 15th and G Streets will be constructed with materials and details similar to those of the historic buildings. The architectural niche on G Street parallels the one on F Street. These architectural elements set

off the lower scale and historic facade elements along 15th Street from that of the new construction, providing a transition, that sensitively blends the old and new. The setback of 45 feet from the 15th Street facade also helps to enhance the historic fabric of the Keith-Albee and Metropolitan Bank buildings and to complement the Treasury Building. The proposed project, with the 45' setback, was reviewed by the Commission of Fine Arts, and approved by it at its December 11, 1979 meeting (Exhibit No. 91). In its preservation of the Keith-Albee and National Metropolitan Bank buildings, the applicant's design proposal is one of exemplary architecture in that it successfully and sensitively incorporates significant architectural and historic elements with that of new construction at a prominent location along the area known as the White House precinct and Presidential Parade route.

CONCLUSIONS OF LAW:

1. Pursuant to Sections 5(e) and 6(f) of D.C. Law 2-144 no demolition permit or alteration permit may be issued unless

the Mayor or his designated agent finds that issuance of the permit is necessary in the public interest. Section 3(j) of the Act defines "necessary in the public interest" as "Consistent with the purposes of this act as set forth in Section 2(b) or necessary to allow the construction of a project of special merit." Section 3(k) defines "special merit" as "a plan or building having significant benefits to the District of Columbia or to the community by virtue of exemplary architecture, specific features of land planning, or social or other benefits having a high priority for community services." Under the law the applicant has the burden of proving a case of special merit.

2. The Mayor's Agent is of the opinion that the Findings of Fact show that with three landmark structures on the block and efforts to develop the block since 1977, before the passage of D.C. Law 2-144, the applicant's decision to preserve the Keith-Albee along with that of National Metropolitan Bank allowed the design of a project of exemplary architecture.

3. The Mayor's Agent therefore finds that the applicants' application for alteration for preliminary review is one of special merit by virtue of exemplary architecture. The Mayor's Agent finds that the alteration is one of exemplary architecture because of the sensitive incorporation of the facades of the Keith-Albee Building along with that of the adjacent National Metropolitan Bank Building into the total project. The facades of these two structures create a major design impact at one of the most strategic locations along the ceremonial route between the Capitol and the White House. Visually and architecturally integral parts of the 15th Street financial district, these facades offer particular reinforcement to the monumentality and powerful rhythm of the colonnaded east side of the U.S. Treasury Building. They create a sense of ceremonial closure before the climactic turn of the route onto Pennsylvania Avenue toward the White House. The scale, massing, fenestration, and other

details of the facades of the Keith-Albee and National Metropolitan Bank Building are continued into the new construction at the southwest corner of the block so that the sense of monumentality and rhythm is achieved along the entire 15th Street frontage.

4. Although the party in opposition presented other design solutions including retention of the Rhodes Tavern, this did not rebut the evidence presented by Applicants that their design solution was itself a project of special merit.

5. Therefore, the Mayor's Agent finds that the demolition permit for the partial demolition of portions of the National Metropolitan Bank Building is necessary to allow the construction of a project of special merit.

6. The Mayor's Agent finds that the permits requested for demolition or relocation of the structure known as Rhodes Tavern to allow the construction of a contemporary structure complementing the scale, massing and monumentality and continuing the cornice lines of the

Keith-Albee and National Metropolitan Bank Buildings, Category II Landmarks and sympathetically relating to the scale and design of the U.S. Treasury, a Category I Landmark (HPA Nos. 80-41 and 80-43) is necessary to allow the construction of a project of special merit.

ORDERED:

Issue demolition and alteration permits. Applications for HPA Nos. 80-41, 80-43, 80-46, and 80-42 are necessary in the public interest in order to allow the construction of a project of special merit.

/s/ Carol B. Thompson
Mayor's Agent

February 11, 1980
Date